VONG BAN HIN

v.

LAKSAMANA REALTY SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-55-2001]
3 APRIL 2003

CIVIL PROCEDURE: *Appeal - Appeal from subordinate courts to High Court - Competency - Appeal from decision made pursuant to application filed under O. 24 r. 1(1) Subordinate Courts Rules - Whether against a "non-trial decision" - Whether against a "trial decision" - Time period for filing of record of appeal thereof - Whether within three weeks of filing of notice of appeal - Failure to abide by statutory time frame - Whether fatal - Whether appeal rendered incompetent - Subordinate Courts Rules 1980, O. 24 r. 1(1), O. 28 rr. 1-20, O. 49 rr. 3A(3), 6(1) & (3) - Rules of High Court 1980, O. 32, O. 56*

On 14 June 2001, before the learned Sessions Court Judge below, the defendant applied by way of a notice of application under O. 24 r. 1(1) Subordinate Courts Rules 1980 ('SCR') for an order of "final judgment together with other relief". On 29 August 2001, the learned judge dismissed the application whereupon the defendant appealed. The defendant had filed the notice of appeal within time on 11 September 2001, but had not done so in respect of the appeal record, which was only filed some 10 months later on 30 July 2002. Before the learned appellate judge, the plaintiff argued that the defendant's failure to file the appeal record within the three-week time frame stipulated in O. 49 r. 6(3) SCR was fatal to the appeal, and in the circumstances applied by way of preliminary objection for the striking out of the appeal. The defendant argued that O. 49 r. 6 SCR was inapplicable, as the appeal was not against an interlocutory decision but against a decision made after trial. It was the defendant's stand that the proper Order to apply was O. 49 r. 3A(3) SCR, with which it had fully complied, considering the many correspondences that it had with the court below pertaining to the supply of the grounds of judgment, the last of which was on 18 July 2002, ie. 12 days before the filing of the appeal record. Upon the obtaining facts, a question hence arose as to the proper time frame allocated for the filing of the appeal record, in respect of "an appeal from a decision made pursuant to an application filed under O. 24 r. 1(1) of SCR".

Held:

[1] The process of appeal in O. 49 r. 6(1) SCR only applies to an appeal from a decision other than a decision made after trial and such an appeal shall lie to a judge in chambers of the High Court. The use of the operative words "any decision other than a decision made after trial" therein means that a distinction has been made between a "non-trial decision "and a "trial decision" so that O. 49 r. 6(1) applies wholly and exclusively to an appeal from a "non-trial decision" to the exclusion of a "trial decision". (p 501 g-i)

[2] A "non-trial decision" is a decision made by a subordinate court in the same way as a decision is made by the registrar of the High Court in chambers, whereby an appeal therefrom would also lie to a judge in chambers under O. 56 Rules of the High Court 1980 ('RHC'). A "non-trial decision" is thus a decision made pursuant to an application filed by way of a notice of application in subordinate court. The defendant's application was admittedly filed under O. 24 r. 1(1) SCR and is an application in chambers identical to an application filed under O. 32 RHC before registrars. (p 502 a-d)

[2a] A "trial decision" on the other hand is made by a subordinate court after a trial. A trial means a full trial and does not proceed by notice of application under O. 24 r 1(1) but conducted in open court pursuant to O 28 r. 9 to 20 SCR. A decision made thereon, consequently, is a "trial decision" to which O. 49 r. 6(1) would not apply. (pp 502 g & 503 a-b)

[3] The defendant's application here is a "Notis Permohonan" filed pursuant to O. 24 r. 1(1) & (2), to be heard in chambers. In the circumstances, there is no doubt that a decision made thereon is a "non-trial decision" that would come within the ambit and purview of O. 49 r. 6(1). (p 503 c)

[4] Applying O. 49 r. 6(3) SCR, the time limited for filing the record of appeal is within three weeks after the filing of the notice of appeal on 11 September 2001, and that would be on or before 3 October 2001. And, being an appeal against a "non-trial decision" the appeal record shall consist of 4 documents only, namely the application, pleadings, affidavits and order or draft order of the decision appealed from, but not the notes of evidence, grounds of judgment or memorandum of appeal. That being the case, the appeal record filed by the appellant, being some 10 months later on 30 July 2002, is incompetent and fundamentally flawed. (p 503 d-g)

[5] Order 49 r. 3A(3) SCR does not apply to the filing of an appeal record in an appeal from a "non-trial decision" but instead regulates the filing of an appeal record for the purposes of pursuing an appeal from a "trial decision" as the appeal record must mandatorily contain *inter alia* the notes of evidence, the grounds of judgment or any memorandum of appeal. Further, O. 49 r. 3A(3) makes no mention of proceedings in chambers or an appeal to a judge in chambers. The court, therefore, cannot sustain the contention that O. 49 r. 3A(3) applies in order to enable the defendant to file the appeal record within the six weeks stated therein. (p 504 c-d)

[5a] The defendant's inclusion of the phrase "penghakiman muktamad" in an interlocutory application under O. 24 r.1(1) cannot make a decision thereon a "trial decision" in order to remove it outside the ambit of O. 49 r. 6(1) and bring same within O. 49 r. 3A(3) SCR. (p 504 e)

[Appeal struck off and dismissed.]

Case(s) referred to:

Kemajuan Hunda Kredit (Kuching) Sdn Bhd v. Titus Chuo Mui Ing [1995] 2 CLJ 102 HC ***(refd)***

Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd [1999] 1 CLJ 337 CA ***(refd)***

Natural Art Materials Industries Sdn Bhd & Anor v. Oriental Top Ltd [1998] 6 MLJ 313 HC ***(refd)***

Nikodo (s) Pte Ltd v. GVC Karaoke Sdn Bhd [1997] 2 CLJ 906 HC ***(refd)***

Pembinaan Nadzri sdn Bhd v. Koon Hoe Co Sdn Bhd [1996] 2 CLJ 1038 HC ***(refd)***

Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA ***(refd)***

Subran Kunhikuttan v. Aladath Putham Veetal Moidutty [1997] 4 CLJ 91 HC ***(refd)***

Tan Mooi Choo v. Fatimah Ayob [1997] 1 CLJ Supp 605 HC ***(refd)***

Thong Kim Chea v. Thong Seng & Co Sdn Bhd & Anor [1996] 1 CLJ 153 CA ***(refd)***

Vong Ban Hin v. Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 3, O. 32, O. 56,

Subordinate Courts Rules 1980, O. 24 r. 1(1), O. 28 rr. 1, 9, 17, 20, O. 49 rr. 3A(3), 6(1), (3)

For the respondent - J Amardas; M/s Bashir & Co

For the defendant - Lim Whei Chun; M/s Tunku Amiruddin & KK Chew

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Appeal

Before me is the appeal filed by the appellant (defendant) on 11 September 2001 against the decision of the learned sessions court judge who had on 29 August 2001 dismissed with costs the defendant's application in encl. (85) dated 14 June 2001, wherein the defendant sought an order that "penghakiman muktamad dengan relief-relief lain" (final judgment together with other reliefs) be given to the defendant.

Preliminary Objection By Respondent Plaintiff

At the outset of the hearing of this appeal before me, En. J. Amardas, learned counsel for the respondent (plaintiff), raised a preliminary objection on the ground that the defendant's appeal record has been filed out of time.

He said that the notice of appeal was filed on 11 September 2001 and so the appeal record must be filed within three weeks thereafter ie, on or before 3 October 2001. He contended that since the appeal record was filed on 30 July 2002, it was some 10 months after the due date.

As there was no application for extension of time to file the appeal record out of time, he argued that there was no proper appeal before this court, the appeal being incompetent. He relied on *Thong Kim Chea v. Thong Seng & Co Sdn Bhd & Anor* [1996] 1 CLJ 153; *Kemajuan Hunda Kredit (Kuching) Sdn Bhd v. Titus Chuo Mui Ing* [1995] 2 CLJ 102; *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449; and *Tan Mooi Choo v. Fatimah Ayob* [1997] 1 CLJ Supp 605.

Defendant's Contention

En. Lim Whei Chun, learned counsel for the defendant, contended that the plaintiff's crucial premise that this appeal was not an appeal against a decision made after trial was a wrong premise. He stressed that the instant appeal is an appeal against a decision made after trial ie, a final decision as opposed to an interlocutory decision. He sought support in *Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd* [1999] 1 CLJ 337; *Natural Art Materials Industries Sdn Bhd & Anor v. Oriental Top Ltd* [1998] 6 MLJ 313; *Pembinaan Nadzri Sdn. Bhd. v. Koon Hoe Co. Sdn. Bhd.* [1996] 2 CLJ 1038; *Vong Ban Hin v. Laksamana Realty Sdn. Bhd.* [1996] 4 CLJ 852.

He submitted that the defendant's application was to convert an interlocutory judgment into a final judgment, by way of a notice of application under O. 24 r. 1(1) of the Subordinate Courts Rules 1980.

He reiterated that the appeal herein was against a decision made after trial, and that the defendant did not have to show why the appeal record was filed some 10 months after the due date.

He explained that the defendant was working on the applicability of O. 49 r. 3A, as opposed to O. 49 r. 6, as he had on 14 December 2001 asked for the grounds of decision from the learned sessions court judge, and the reply was that no grounds of decision would be required.

He added that prolonged correspondence ensued and that he had on 18 July 2002 sent the last reminder for the grounds of decision although he has previously been informed that no such grounds were required. Subsequently the defendant filed the appeal record on 30 July 2002.

Decision Of The Court

Question For Determination

After giving the aforesaid submissions my most anxious consideration, I am of the view that the question for determination herein may be couched as follows:

> In an appeal from a decision made pursuant to an application filed under O. 24 r. 1(1) of the Subordinate Courts Rules 1980, what is the period limited for the filing of the appeal record?

Non-Compliance With Rules

Before I proceed to consider the answer to the above question, it is necessary for me to observe that both the learned counsel for the plaintiff and the defendant respectively have taken a common stand that notwithstanding the fact that the question brought about by the preliminary objection is frought with technicalities, it should nevertheless be considered and determined by the court.

They have achieved a consensus that while O. 2 r. 3 of the Rules of the High Court 1980, as amended *vide* PU(A) 197/2002 with effect from 16 May 2002, disallows any preliminary objection on the ground of non-compliance with any of the Rules of the High Court unless such non-compliance has occasioned a substantial miscarriage of justice, the Subordinate Courts Rules 1980 does not contain equipollent provisions. Hence, learned counsel have presented their respective submission with every vigour.

In deference to the consensus of these learned counsel, I have decided to consider the merits of their submissions and give a definitive answer thereto.

The route to that answer may be established by upholding one of the two sharply contrasting submissions pertaining to the applicability of O. 49 r. 6 which the plaintiff's learned counsel urged this court to invoke, or O. 49 r. 3A which the defendant's learned counsel implored the court to confirm.

Order 49 r. 6

The relevant provisions which call for consideration and determination are O. 49 r. 6(1) and (3) which are reproduced *in extenso* as follows:

> **1. Appeal to Judge in Chambers of the High Court (O. 49 r. 6)**
>
> 6. (1) Notwithstanding anything contained in this Order, an appeal from **any decision other than a decision made after trial** by the Court shall lie to a Judge in Chambers of the High Court, (emphasis added)
>
> (2) ...
>
> (3) **Within three weeks after the filing of the notice of appeal**, the appellant shall file the record of appeal in the High Court, and the record shall contain copies of:
>
> (a) the application for the decision;
>
> (b) all pleadings filed;
>
> (c) all affidavits filed in support of or in opposition to the application; and
>
> (d) the order or draft order of the decision appealed from:
>
> Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal. (emphasis added)

In my view, the provisions contained in O. 49 r. 6(1) are clear and unambiguous. The opening words "Notwithstanding anything contained in this Order" must be construed to mean that in the event of any conflict or inconsistency with any other rules contained in O. 49 eg, O. 49 r. 3A(3), the provisions in O. 49 r. 6(1) shall prevail.

Under O. 49 r. 6(1), it is also clear to me that the process of appeal contained therein shall only apply to an appeal from a decision other than a decision made after trial and such an appeal shall lie to a judge in chambers of the High Court.

The use of the operative words "any decision other than a decision made after trial" in O. 49 r. 6(1) means that a distinction or dichotomy has been devised between a "non-trial decision" and a "trial decision" so that O. 49 r. 6(1) applies wholly and exclusively to an appeal from a "non-trial decision" to the exclusion of a "trial decision".

"Non-Trial Decision" And "Trial Decision"

What then is a "non-trial decision", or conversely a "trial decision"? The Rules Committee in enacting O. 49 r. 6(1) did provide some indication by categorically stating that an appeal against a "non-trial decision" shall lie to a judge in chambers of the High Court, which means that a non-trial decision is a decision made by a subordinate court in the same way as a decision is made by the registrar of the High Court in chambers, whereby an appeal therefrom would also lie to a judge in chambers of the High Court under O. 56 of the Rules of the High Court 1980.

A "non-trial decision" is therefore a decision made pursuant to an application filed by way of a notice of application in a subordinate court. The defendant's application was admittedly filed under O. 24 r. 1(1) of the Subordinate Courts Rules 1980 and is an application in chambers identical to an application by way of summons in chambers filed under O. 32 of the Rules of the High Court 1980 before registrars.

Order 24 r. 1(1) of the Subordinate Courts Rules 1980 refers to an application for the purposes of proceedings in chambers. Order 49 r. 6(1) also refers to an appeal to a judge in chambers. Naturally, an appeal from a decision made pursuant to an application filed under O. 24 r. 1(1) should lie to a judge in chambers under O. 49 r. 6(1). Such a decision is also known as an interlocutory decision.

In *Nikodo (S) Pte Ltd v. GVC Karaoke Sdn Bhd* [1997] 2 CLJ 906, Abdul Kadir Sulaiman J (now JCA) held, *inter alia*, that O. 49 r. 6(1) prior to the amendment in 2000, applies to an appeal against an interlocutory order made by a subordinate court and such an appeal lies to a judge in chambers. (See also *Subran @ Subramaniam a/l Kunhikuttan v. Aladath Putham Veetal Moidutty* [1997] 4 CLJ 91 per Azhar JC (now J); *Tan Mooi Choo, supra*, *Kemajuan Hunda, supra*). The amendment effected *vide* PU(A) 342/2000 has retained the provision governing an appeal to a judge in chambers.

On the other hand, a "trial decision" is in my view a decision which is made by a subordinate court after a trial. The word "trial" is not defined in the Subordinate Courts Rules 1980 but the word "hearing" is defined in O. 1 r. 6 as meaning any proceedings in court ie, open court or in chambers.

Order 28 of the Subordinate Courts Rules 1980 contains detailed provisions governing hearing. It seems apparent to me that a clear distinction is made between a hearing and a trial, in that under the provisions of O. 28 r. 1 to r. 8 thereof, a hearing would cover a hearing of all types of proceedings, while under O. 28 r. 9 to r. 20 a trial is confined or narrowed down to more specific

proceedings, in particular the trial of the entire suit or action, which practically includes eg, the calling of witnesses who are to give *viva voce* evidence under O. 28 r. 13; or the trial judge's inspection of any place or thing under O. 28 r. 17. A decision made thereon is in my view a "trial decision" to which O. 49 r. 6(1) would not apply. It is an exception expressly excluded therefrom. A trial means a full trial (see *Kemajuan Hunda, supra*). A trial does not proceed by way of a notice of application under O. 24 r. 1(1), but is conducted in open court pursuant to O. 28 r. 9 to r. 20.

Defendant's application in encl. (85) is a "notis permohonan" ie, a notice of application which is adapted from Form 65 in Schedule A to the Subordinate Courts Rules 1980 and filed pursuant to O. 24 r. 1(1) and (2), to be heard in chambers. In the circumstances, there is absolutely no doubt in my mind that a decision made thereon is a "non-trial decision" within the ambit and purview of O. 49 r. 6(1). That being the case, the provisions of O. 49 r. 6 would apply as it is the established practice in all interlocutory proceedings.

Under O. 49 r. 6(3), the time limited for filing the appeal record is within three weeks after the filing of the notice of appeal on 11 September 2001, and that should be on or before 3 October 2001. Being an appeal against a "non-trial decision", the appeal record under O. 49 r. 6(3) shall consist of four documents only *viz.* the application, pleadings, affidavits and order or draft order of the decision appealed from, but not the notes of evidence, grounds of judgment or memorandum of appeal. The purpose of these provisions is to facilitate expeditious disposal of such appeals.

In *Kwong Yik Bank, supra,* it was held by the Court of Appeal that the true purpose of O. 49 r. 6 was to provide for a summary and speedy disposal of appeals against decisions of subordinate courts made in interlocutory proceedings, including those under O. 26A and in all such appeals there is no necessity to file a memorandum of appeal (see also *Vong Ban Hin, supra*; *Pembinaan Nadzri, supra; Natural Art Materials, supra*).

That being the case, I hold that the appeal record filed by the defendant herein some 10 months later ie, on 30 July 2002 is fundamentally flawed in that it went beyond the time limited for such filing.

Order 49 rule 3A(3)

In the event that I have erred in construing O. 49 r. 6(1) and (3) and hence arrived at an erroneous conclusion, I shall now consider the submission of defendant's learned counsel in support of the defendant's appeal ie, the appeal record was filed within the time limited under O. 49 r. 3A(3).

Order 49 r. 3A(3) reads as follows:

> **3A Appeal record where appellant is represented (O. 49 r. 3A)**
>
> (3) Two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.

Upon a proper perusal thereof, I am of the view that O. 49 r. 3A(3) does not apply to the filing of an appeal record in an appeal from a "non-trial decision" but instead regulates the filing of an appeal record for the purposes of pursuing an appeal from a "trial decision" as the appeal record must mandatorily contain *inter alia*, the notes of evidence, the grounds of judgment or any memorandum of appeal. These three latter documents are expressly excluded under O. 49 r. 6(3).

Further O. 49 r. 3A(3) has made no mention of proceedings in chambers or an appeal to a judge in chambers. I am therefore unable to sustain the submission for the defendant that O. 49 r. 3A(3) applies in order to enable the defendant to file the appeal record within the six weeks therein stated.

The defendant's inclusion of the phrase "penghakiman muktamad" (final judgment) in an interlocutory application under O. 24 r. 1(1) cannot in my view make a decision thereon a "trial decision" in order to remove it outside the ambit and purview of O. 49 r. 6(1) and to bring it within O. 49 r. 3A(3).

Conclusion

On the foregoing grounds, my answer to the aforesaid question is that the appeal record has to be filed within three weeks after the filing of the notice of appeal under O. 49 r. 6(3). Since the appeal record has been filed out of time without any application for extension or enlargement of time, I hold that the appeal record has contravened O. 49 r. 6(3) and that the defendant's notice of appeal is incompetent. The inevitable result is that it is hereby struck off and the appeal dismissed with costs.